IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 785 of 1992

with

CRIMINAL APPEAL No 831 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LILA MASHRAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 785 of 1992
   MR YOGESH S LAKHANI for Petitioners No. 1-2
   Mr K P RAval, APP for Respondent No. 1
2. Criminal Appeal No. 831 of 1992
   MR YOGESH S LAKHANI for Petitioner No. 1
   MR K P RAval, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 27/12/2001

C. A. V. JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

These two appeals have been filed under section 374 of the Criminal Procedure Code, 1973 against the judgment and conviction order dated 20.7.1992 passed by the learned Addl.Sessions Judge at Porbandar in Sessions Case No.3/92, under which the learned Addl.Sessions Judge convicted the aforesaid appellants for the offence punishable under section 302 of IPC read with section 34 of IPC and sentenced them to suffer R.I. for life and further directed them to pay fine of Rs.500/-. The appellants have been directed to undergo further R.I. for three months in default of payment of fine. The appellants have also been convicted for offence under section 37(1) read with section section 135 of Bombay Police Act and have been sentenced to suffer R.I. for four months and they have been directed to pay fine of Rs.100/-, in default of payment of default, they have been directed to further undergo R.I. for 15 days.

2. In fact the appellants stood as accused before the learned Addl.Sessions Judge at Porbandar in Sessions Case No.3/92. The original accused No.3 and 4 have filed Criminal Appeal No.785/92 whereas original accused No.1 and 2 have filed a separate Criminal Appeal being No.832/92. Both the appeals arise from one and the same judgment in one and the same case before the learned Addl.Sessions Judge, Porbandar. Common arguments have also been advanced by the learned Advocates for the parties, therefore, both the appeals are being heard and disposed of by this common judgment.

2. The facts of the case of the prosecution may be briefly stated as follows:

That on 6.8.1991, little before 9.10 a.m., the appellants, according to the case of the prosecution, dealt knife blows on the person of the deceased Laxman Arjan, brother of eye witness Bogha Arjan, just near the gate of the court building of Porbandar and deceased Laxman Arjan sustained as many as 36 injuries on his person. On account of the said charges, deceased Laxman Arjan died on the spot. According to the case of the prosecution, the event was witnessed by PW 12 Bogha Arjan

Exh.31, who is the brother of the deceased. FIR was filed by PW 14 Balu Rama Exh.34, who was not an eye witness to the incident in question. The FIR has been produced at Exh.35. The case of the prosecution is that there was a motive behind the said incident and the said motive is also relevant for the purpose of disposing and deciding the case before us. This has been disclosed by the brother of the deceased PW 12 Bogha Arjan at Exh.31. There he has stated that one Balu Laxman was murdered before about 6 to 7 years and deceased Laxman Arjan and one relative of his family Ranmal Giga were involved in the said offence. That deceased Laxman Arjun as well as Ranmal Giga both were acquitted in the said offence. That Balu Laxman was the brother of accused No.1 Karsan Laxman and, therefore, with a view to take revenge of the previous offence, the appellants have collectively assaulted the deceased and they have killed him by inflicting knife blows on his person. At the initial stage, Balu Rama at Exh.34 had filed FIR Exh.35 without disclosing names of the assailants, since he was not an eye witness to the incident. Thereafter PW 12 Bogha Arjan at Exh.31 disclosed names of the assailants during the course of his statement recorded by the Investigating Officer. Therefore, search was made with respect to the appellants and they were arrested and, after their arrest, the investigation proceeded ahead and after conclusion of the investigation, the I.O. found that there were materials before him for filing charge sheet against the appellants. Therefore, charge sheet was filed before the learned Judicial Magistrate First Class, Porbandar. The learned Magistrate found that the offence punishable under section 302 of IPC was exclusively triable by the Court of Sessions and, therefore, he committed the case against the appellants to the Court of Sessions. There, it was registered as Sessions Case No.3/92. The learned Addl.Sessions Judge, Probandar supplied copies of police investigation papers to the appellants. Charge at Exh.2 was prepared and framed. It was read over and explained to the appellants on 3.6.1992. The appellants pleaded not guilty to the charge and claimed to be tried. Therefore, the learned Judge proceeded to record evidence produced before him by the prosecution. After conclusion of the evidence, the learned Addl.Sessions Judge recorded further statements of the appellants under Section 313 of the Criminal Procedure Code, 1973 (for short, 'the Code'). The learned Judge heard the arguments advanced by the learned Advocates and thereafter, the learned Judge found that there was reliable evidence on record to convict the appellants for the aforesaid offence. Accordingly, the learned Judge convicted the appellants for the offence

punishable under Section 302 read with section 34 of IPC. The learned Judge also convicted the appellants for offence punishable under Section 37(1) read with Section 135 of the Bombay Police Act. The learned Judge also sentenced the appellants as aforesaid.

4. Feeling aggrieved by the said judgment and conviction order of the learned Addl.Sessions Judge, the appellants have preferred this appeal before this court. The appellants have contended before this Court that the learned Judge has committed serious error in relying upon the evidence of Bogha Arjan Exh.31. That the entire evidence tendered by the said witness is highly unnatural and his conduct clearly indicates that he was not a witness to the incident and he has been introduced as a witness with a view to involve the appellants falsely in the present case. That he was not present at the time when the offence was committed by someone else. That even his evidence that he had chased the appellants is also not acceptable. That the evidence of this witness saying that when he returned to the spot, the dead body of the deceased brother was not there, is also not acceptable. That even the witness said that at the time when he returned to the spot, the police was preparing panchnama and yet he did not contact the police officer drawing panchnama for the purpose of disclosing the names of the appellants. That his statement was recorded very late and there was sufficient time for introducing the names of appellants falsely in the present case since the FIR and other investigation papers did not disclose names of the assailants. That therefore, the evidence of Bogha Arjan could not have been relied upon by the learned Addl. Sessions Judge. It has also been contended that even PW 14 Balu Rama at Exh.34 is also not a witness to the incident and that can be gathered from his FIR Exh.35 which does not disclose names of the assailants. It is further contended that PW 15, Amriben Exh.36, the mother of the deceased, who believed to be a true witness by the learned Addl.Sessions Judge is also not a reliable witness, as there were contradictory statements given by her. That this family had strong reservations against the appellants for falsely implicating them in the present case. That there is no evidence on record to show that the offence was committed by the present appellants. That the offence is said to have been committed by the accused before 9 a.m. in the broad day light in the heart of City of Porbandar. That the place of offence is surrounded by many shops and it is a thickly populated locality. That even the municipal bus terminal is just opposite the place of offence. That therefore, many disinterested witnesses must be present

at the time of commission of offence and yet the prosecution did not examine a single disinterested neutral witness to support the case of the prosecution. That in that view of the matter, the interested testimony of the prosecution witness Bogha Arjun at Exh.31 should have been rejected by the prosecution. That on the whole, the judgment and conviction order of the learned Addl.Sessions Judge are illegal and erroneous and deserve to be set aside. The appellants, therefore, pray in both these appeals that these two appeals be allowed, the judgment and conviction order of the learned Judge be quashed and set aside and the appellants in both the appeals be ordered to be acquitted and they may be ordered to be set at liberty forthwith.

5. At the stage of admission, the appeal was ordered to be admitted and bail was refused by order dated 23.2.1993. At the initial stage, Mr Pravin Gondaliya, learned Advocate argued the matter on behalf of Mr Y S Lakhani for the appellants to a great extent. Subsequently, Ld. Advocate, Mr Y S Lakhani also appeared and argued the matter and also submitted the points and submission at the close of his arguments. On the other hand, Mr K P Raval, learned APP supported the judgment of the trial court. Therefore, we are required to deal with the evidence produced on record.

6. In order to prove guilt of the appellants, the prosecution has examined as many as 20 witnesses. They can be enlisted as follows:

(i) PW 1 Dr. D A Vyas Exh.17
(ii) PW 2 Navin Mehta, who prepared
the sketch at Exh. 20 Exh.18
(iii) PW 3 Manoj Vasudev, Panch Exh.21
(iv) PW 4 Bhoja Pota " Exh.23
(v) PW 5 Arjan Veja " Exh.24
(vi) PW 6 Vinodrai " Exh.25
(vii) PW 7 Narsi Arjan " Exh.26
(viii) PW 8 Hitesh Maganlal " Exh.27
(ix) PW 9 Harish Gagan " Exh.28
(x) PW 10 Meraman Vangha " Exh.29
(xi) PW 11 Pita Parbat " Exh.30
(xii) PW 12 Bogha Arjan, Eye witness Exh.31
(xiii) PW 13 Babulal Premji, Panch Exh.33
(xiv) PW 14 Balu Rama, informant Exh.34
who submitted FIR at Exh.35
(xv) PW 15 Amriben Hardas, mother of
the deceased Exh.36
(xvi) PW 16 Dhangar Devgar, P.S.O. Exh.37

(xvii) PW 17 Nonghan Savdas Exh.39
(xx) PW 20 P.I. Dabekar Exh.42
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7. It may be stated at the outset that out of the aforesaid 20 witnesses, many of them have turned hostile and they have not supported the case of the prosecution. These hostile witnesses include PW 3 Exh.21, PW, Exh.23, PW 5, Exh.24, PW 6 Exh.25, PW 7 Exh.26, PW 8, Exh.27, PW 9, Exh.28, PW 10, Exh.29, PW 11, Exh.30 and PW 13, Exh.33. So these witnesses have not supported the case of the prosecution to any extent. Therefore, it is not very much necessary to go through their evidence since their evidence does not get corroboration from other angles also. In fact, their evidence does not support the case of the prosecution to any extent and, therefore, it is not even necessary to go through the evidence supporting some part of their evidence on record.

8. The prosecution has mainly relied upon the evidence of PW 12, Bogha Arjan Exh.31. Since he is the only witness to the incident in question, it would be necessary for us to closely scrutinise the evidence of this witness.

9. So far as this witness is concerned, it is undisputed that he was the brother of the deceased and, therefore, he should have some interest in bringing conviction to the appellants. Another aspect of the case is that according to his own evidence, one Balu Laxman, brother of accused no.1 was murdered and in the said matter, the present deceased Laxman Arjan and one of his relative Ranmal Giga were involved and both of them were acquitted in the said case. That therefore, according to the case of this witness, the appellants have killed his brother Laxman Arjan. This shows that there was a case of previous enmity between the two groups. Therefore also it would be necessary for us to go for a close scrutiny of the evidence of this witness. The matter does not rest there. This witness has stated in the cross-examination that since the appellants were his enemies, he wanted to chase the appellants and also wanted to catch hold of them. That therefore, he chased the appellants without any fear from them. He has further stated in the cross-examination that had he been able to catch the appellants, he would have fought with him. He has further stated that there was deep root of enmity between the two. This also shows that the witness had strong inimical feelings for the appellants and, therefore, likelihood of false implication of the appellants in the case of murder of his real brother

cannot be totally ruled out. Therefore, also his evidence is required to be scrutinised very closely.

10. It is an admitted position that the witness as well as deceased were both staying in village Mitrala situated at some distance from Porbandar. The witness has stated at Exh.31 that his father Arjanbhai had left their residence at village Mitrala about 12 to 13 days before the date of the event in question. That therefore, he, in the company of the deceased had gone in search of his father. Now it is to be seen that here also some doubt is created in the statement of fact given by the witness, though the said statement of fact is not very much important for the decision of the case. If the father had left village Mitrala before 12 to 13 days, in the ordinary course of nature, members of the family would have made rigorous efforts for the search of the father. There is no material on record to show that efforts were made by any member of the family to search the father during a span of 12 to 13 days. Another aspect of this case is that the witness and his deceased brother had no reason to search for his father at Porbandar. It is to be seen here that his mother Amriben does not fully support the witness on this point since her evidence differs from the evidence of this witness to some extent. Amriben Hardas Exh.36 had deposed that her husband and father of deceased-Arjan was at Porbandar on the date of the incident. That he was sick and therefore, he was staying at Porbandar for taking medicine and for treatment. She also states that witness Bogha as well as the deceased both have told her that they would bring their father and, therefore, they had gone to Porbandar in a bus starting at about 6 am in the morning. Therefore, the evidence of the mother differs from the evidence given by her son. The son does not say that his father was at Porbandar. On the other hand, the mother does not say that the father left village Mitrala for 12 to 13 days and, therefore, the two brothers had gone to Porbandar in search of him. Therefore, there is contradictory version given by these two witnesses who are mother and brother of the deceased.

11. Even if we do not give more weight to the said contradictory versions of the two witnesses, we can straightaway go to the factual aspects of the evidence of Bogha Arjan at Exh.31. He has stated that both of them had gone to Porbandar in search of the father. That after reaching Porbandar, they were going towards Sudama chowk. That at that time, deceased Laxman Arjan went to take pan near the gate of the court, and he (the witness) went to Sudama Chowk in search of his father. The father

was not found there therefore, he (the witness) returned from Sudama Chowk and when he was on his way back, he saw at some distance, the appellants beating deceased Laxman Arjan. That he was able to identify the appellants and he raised shouts - " stop, stop beating, why do you beat him"? It is also deposed by him that all the four appellants caused injuries to the deceased by means of knife blows. Since he raised shouts, the appellants ran towards the bus stand leaving the deceased there on the ground. That thereafter, the appellant hired a tempo and he (witness) also hired a tempo and chased him towards Birla Chhaya Road. It is also deposed by him that he had returned to the spot as he could not overtake the appellants and the tempo was totally lost sight of.

13. This witness further states that when he returned to the spot, his brother was not found on the spot and the police were drawing panchnama. That Nonghan Savdas was present and he had told him that the appellants had beaten the deceased. That thereafter, his statement was recorded by the police.

14. Now it is to be seen that the incident took place little before 9.10 a.m. This can be seen from an entry made in the police diary showing that the information was received at the police station at 9.10 a.m. about the commission of the offence in question. This means that the offence was actually committed at or before 9.10. a.m. Now it is to be seen that so far as the panchnama is concerned, we can see from the post mortem report at Exh.15 that the dead body was received by the hospital at 11.35 a.m. The post mortem was commenced at 11.45 am and it was completed at 2.15 p.m., on that day i.e. on 6.8.1991. There is no dispute that after the post mortem was over, the dead body of the deceased was handed over to this witness Bogha Arjan. Since the post mortem is shown to have been completed at 2.15 p.m., as per the post mortem report, the dead body of the deceased must have been handed over to Bogha Exh.31 after 2.15 p.m. Even Bogha has also made the thing clear during the course of his evidence. He has stated that in para 3 of his evidence that the police had handed over the dead body of his brother to him. He has also deposed before the trial court that his statement was recorded by the police after the dead body was handed over to him. This would mean that the statement of this witness could be recorded only at or after 2.15 p.m.

15. Now, it is to be seen that according to the evidence of this witness, the appellants had run away towards bus stand after commission of the offence.

Learned Advocate for the appellants Mr Y S Lakhani has clearly pointed out that the witness himself was coming from the bus stand and, therefore, this would mean that the appellants had actually run towards the direction from which the appellant was coming to the spot. Now if the appellants had actually run in that direction, then the witness may not have allowed them to run away he could have caught at least one or two appellants if he could not catch all the four of them. This has not happened.

16. Another aspect of the evidence of this witness is that even according to this witness the appellants hired a tempo and vanished from the place. He has also stated that he also hired a tempo. Now this would naturally consume lot of time as tempo would not be ready and it is nobody's case that a tempo was hired in advance by the witness. If tempo was to be taken to some place then naturally, hiring charges were required to be fixed and that would require some time and it is likely that during that span, the witness would have reached the spot where the appellants were negotiating with the owner or driver of the said tempo. This has not happened.

17. Moreover, even this witness has also said that he also hired a tempo. Again this would require some time and in the meantime, the appellants would run away to a great deal of distance. Yet, according to the case of this witness, he hired a tempo and chased the appellants but he lost sight of the tempo of the appellants and returned to the spot. This also shows that this evidence on the part of this witness cannot be treated to be natural. Moreover, there is no further evidence on record to show as to which tempo was hired by the appellants and which tempo was hired by the witness. So far as the tempo hired by the appellants is concerned, the I.O. could have recorded statement of the drivers or owners of the tempo or other vehicles which might be standing at the said place at the time of the event. From those statements, the prosecution would have further shown that the appellants had actually travelled by the said tempo to some place. This has also not been done in the present matter. Similarly, even the statement of the owner or driver of the tempo hired by witness Bogha has also not been recorded. An attempt was made to argue that the witness Bogha did not know the number of the vehicle hired by him. Even if we accept that Bogha did not note down the number of the said tempo, then also the I.O. could have recorded statements of surrounding persons for getting details about the numbers of the two tempos, names of the drivers or owners of the said two

tempos, the time at which the two tempos left the spot, the time at which the second tempo said to have been hired by Bogha, returned back to the spot in question. These materials could be gathered, had there been some efforts on the part of the I.O. while recording the statements of witnesses who might be present at the relevant point of time.

18. Now it is also to be seen that according to the witness Bogha Argan, when he returned to the spot, dead body of his brother was not there and the police was drawing panchnama of the place of offence. As said above, dead body of his brother was received by the Doctor for conducting post mortem at 11.35 a.m. It would, therefore, be very clear that the witness would not have returned to the spot till about 11 a.m. in the morning. Moreover, if we go through the panchnama on record, it can be gathered that the inquest panchnama Exh.12 was drawn by the Police Investigating Officer on 6.8.1991 at 9.50 a.m. Now this would naturally be drawn when the dead body was there at the spot. This means that till the dead body was sent for post mortem, witness Bogha had not returned to the spot.

19. We can turn to the panchnama relating to the scene of the offence. The said panchnama must have been drawn after 11 a.m. It seems that according to the evidence of the witness, when he had returned to the spot, the said panchnama was being drawn by the police. That would mean that the police officer was present at that time and yet it is not explained as to why witness Bogha did not contact the police investigating officer for conveying that he had witnessed the event and he had seen the appellants committing the said offence. The prosecution has not tendered any explanation as to why the witness did not contact the Police Investigating Officer and did not disclose the names of the appellants before him.

20. Now it is to be noted that at that time witness Nonghan was present there and he was conveyed the aforesaid fact about commission of offence by the said witness and when the panchnama was drawn the said witness was present and if the witness had conveyed him about the aforesaid incident, at least Nonghan would have immediately conveyed the said fact to the Police Investigating Officer and he would have recorded the statement of Nonghan. It has not been done and no explanation has been given as to why the fact has not been disclosed about the involvement of the appellants to the I.O. by any of the witnesses.

21. The witness further said that when he saw the appellants causing injuries to the deceased and when he raised shouts and when the appellants ran away from the place of offence, the distance was not much therefore, the witness could have caught hold the appellants or at least he could have caught hold one or two appellants, out of those four appellants. This has not happened, though the witness immediately chased the said appellants. The witness has said that since the police had informed him that FIR had already been lodged, he did not file FIR before the police. Now this must have happened only after 2.15 p.m., when his statement was recorded by the police. He says that the statement was recorded by the police between 12 noon and 12.30 p.m. This does not appear to be a correct version of the said witness, since the dead body was handed over to him at or after 2.15 p.m. According to Mr K P Raval, the statement of this witness was recorded after the dead body was handed over to him by the police. Since the dead body must have been handed over at or after 2.15 p.m.
the statement of this witness could not have been recorded before 2.15 p.m.

22. This would mean that at first instance, the witness had an opportunity to contact the police officers at the place of the offence where panchnama was being drawn with respect to the scene of offence and according to the evidence of this witness, he was present when the said process was going on. Yet he did not contact the police nor did he try to file FIR before the said police officer. This sort of indifferent attitude on his part creates doubt in his version and his conduct itself.

23. The witness has stated in his chief-examination that one Nonghan Savdas was present there at the place of the offence and he had conveyed to him that all the four appellants had caused injuries to the deceased and even their names were also disclosed to him. Now, if witness Bogha Arjan did not approach the police on the spot, at least Nonghan Savdas could have contacted the police on the spot and could have conveyed that the deceased was killed by the appellants and the said fact was conveyed to him by the brother of the deceased and that the brother of the deceased, who was the witness to the incident was present on the spot. This would have been very natural conduct on the part of Nonghan Savdas. It however, appears that Nonghan did not convey the said fact to the police on the spot. This also shows that the version given by the witnesses is not natural.

24. At this stage, we can consider the evidence of Nonghan Savdas at Exh.39. This witness has stated that he had gone to the spot on the date of the event and had seen the dead body of the deceased on the spot. That at that time, the informant Balu Rama Exh.34 was present there and therefore, he told informant Balu Rama that the said dead body was of the deceased cousin of the witness. That thereafter, he had seen eye witness Bogha Arjan also on the spot and he had told him that the four appellants had committed murder of the deceased.

25. Even despite this position this witness did not convey the said information to the police. Moreover, the statement of this witness, according to the evidence of this witness, was recorded by police investigating officer 16 to 17 days after the incident in question. This also shows that there was some doubt in the conduct and version of this witness also.

26. As said above, the place of offence is the heart of the City. The eye witness himself has admitted that municipal bus stop in Sudama Chowk which is very near to the place of offence. Then there are other shops. Then the evidence is that when the deceased was killed on the spot by the appellant, the occupants of the shops started closing down their shops. Even in that event, the Investigating Agency could have recorded statement of some occupants of those shops. It may be that the said occupants of the shops may or may not have been in a position to identify the appellants. However, the Police Investigating Agency could have arranged for test identification parade for the identification of the accused who had killed the deceased on the spot. This process has not been undertaken. Even we can find that there is one witness Vasubhai at Exh.40 who has testified before the court that four persons were beating the deceased in front of his shop. However, the witness was not made to identify the accused person at a test identification parade. It may be that the witness might not have thoroughly seen the incident and he might have some difficulty in identifying the appellants. Nevertheless, the test identification parade could have thrown some light on the factual aspect of the case and at least from the appearance also the appellants could have been identified by the witness. That shows that the investigation is not complete and some lacuna has been allowed to remain in the investigation and the benefit thereof must go to the present appellants.

27. A suggestion has been made that there is a traffic point by the side of the incident. It is also

suggested that there is a police point near Sudama Chowk. The witness has said that he is not aware of it. At the same time, when the deceased was attacked and assaulted by four persons and when a very good number of injuries were caused on his person, naturally the deceased would have raised some shouts. Same way, his brother Bogha Arjan would also have raised shouts, similarly, the other persons who may have seen the incident may also have raised shouts and these shouts must have invited the attention of other persons. However, the police has not reached the spot which also suggests that there is some doubt about the version given by the witness. On the other hand, the police has reached the spot only after the FIR was filed by informant Balu Rama at Exh.34. Informant Balu Rama has been examined at Exh.34. He has gone to the extent of saying that after lodging FIR he was taken to the spot by the police officer in police vehicle and when he reached the spot, he found Nonghan Savdas and witness Bogha Arjan on the spot and at that time dead body of the deceased was also lying there. If this is the correct version of the witness, then his evidence would falsify by the evidence given to Nonghan and Bogha Arjan. These witnesses do not say that they were present when the police arrived there. They also do not say that the dead body was lying there when they reached on the spot. Therefore, there is some sort of contradictory version given by Balu Rama, Bogha Arjan and Nonghan Savdas at Exhs. 34, 31 and 39 respectively.

28. The witness has further said that after reaching the spot with the police officer, he had never gone to any other place. This means that the witness was present there for a considerably long time. This would also show that he must be present there at the time when Bogha Arjan arrived on the spot. Now if the witness was present at the time when Bogha arrived on the spot and if he had seen Bogha on the spot, then naturally he would have contacted Bogha, since he knew that Bogha was the real brother of the deceased. Even if he did not know that Bogha was the eye witness to the incident, at least he would have contacted him for the purpose of conveying him that he had filed FIR. This sort of indifferent conduct and behaviour on the part of eye witness Bogha at Exh.31, informant Balu Rama at Exh.34 and Nonghan Savdas at Exh.39 lead us to infer that the prosecuting agency as well. The aforesaid witnesses have been hiding something from the court and the true version of the actual occurrence is not allowed to be brought on record.

29. At the same time, if the statement of witness Bogha Arjan was recorded after 2.15 p.m. then it conveys

that there was sufficient time lag for him to think as to what should be the statement. This witness was the first in time in disclosing the names of the appellants on police record. This shows that names of the appellants were disclosed on police record not before 2.15 p.m., though the incident took place before 9 a.m. in the heart of the City. In sofar as the witnesses are concerned, it is very clear that the FIR at Exh.35 does not disclose names of the appellants or any other accused. His further statement was also recorded but it does not appear to be a fact that the witness had disclosed presence of Nonghan Savdas and Bogha Arjan on the spot when he reached the spot after filing the FIR. There also appears to be some contradictory version between the evidence on record and the statement of the witness.

30. Amriben Hardas Exh.36 is the mother of the deceased as well as of Bogha Arjan. According to her evidence the father of the deceased was not keeping good health and, therefore, he had gone to Porbandar for treatment and medicine. The version given by Bogha Arjan does not say that his father was sick and therefore. he had gone to Porbandar for treatment. Moreover, if the version of Amriben is true that Arjan has gone for medicine and treatment to Porbandar, then Amriben will naturally know the place at which Arjan would be available. In that case, both Bogha and the deceased would have gone to that place directly where their father was likely to be available. Instead, the two brothers went to the bus stand of Sudama Chowk in search of the father. This conduct and attitude on the part of this witness Bogha is again not natural. Nothing has come out as to what happened to the father ultimately. It is nobody's case that the informant could contact Arjan at Porbandar on the date of the incident in question. Arjan does not appear to have been examined as a witness to clarify the position. This action creates a doubt as to the real purpose that the informant as well as for the deceased for going to Porbandar. It is to be considered that if Bogha had really any information that the father had gone to Porbandar before about 10 days for treatment and medicine as per Exh.36, these two brothers had absolutely no reason to make search for their father in Sudama Chowk. Instead, they would have directly gone to a place at which their father was likely to be available. Amriben has also stated at Exh.36 that the appellants had told before about two months that the deceased should be kept in control, else they would kill him. This fact has not been conveyed by her to the police when the statement was recorded by the Investigating Officer. This shows

that there is material improvement in the evidence of this witness which provides motive on the part of the appellants for committing the offence in question. Even with respect to medicine and treatment for her husband-Arjan, she has made it clear that this fact was not conveyed to the police when her statement was recorded. Some suggestions have been made to her with respect to the character of the deceased. Suggestions have been made that the many persons had ill-feelings for the deceased. Suggestions have also been made to the effect that the deceased was involved in some anti-social activities. However, the witness has denied the said fact. Naturally, she being the mother of the deceased, would not like to say something involving the character of the deceased. At the same time, there is no further material on record to doubt the character of the deceased.

31. Any way, looking to the above discussions, it becomes clear that the evidence of Bogha at Exh.31 is neither trustworthy nor reliable. The reasons can be summarized in a brief manner as follows:

(a) The witness Bogha Arjan is the brother of the deceased

(b) He is the solitary eye witness to the incident in question according to his own case and since no other eye witness has been examined and there is no statement recorded by the police who could be treated to be eyewitness to the incident in question.

(c) There was previous enmity between the deceased and the witness Bogha on the one side and the appellants on the other side.

(d) The witness Bogha has himself stated in cross examination that there was a strong inimical feeling against the appellants. The witness did not feel shy in narrating the said feeling in strong hard words which can be reproduced for ready reference as follows:

(e) It seems that the appellants were found running away on seeing the witness Bogha, after committing the murder. according to his evidence, in the direction from which Bogha was coming and yet Bogha could not catch hold of any of them.

(f) Though he is said to have tried to chase the appellants by hiring a tempo, no investigation has been carried out in this direction with a view to find out the tempo hired by the appellants and the tempo hired by the witness. No attempt appears to have been made to get evidence on this line.

(g) The police was present and panchnama of the scene of offence was being drawn at the time when witness Bogha Arjan returned to the spot after giving up the chase. Yet he did not contact the police and he did not convey the entire story that the deceased was killed by the four appellants in his presence and he tried to chase them but track was lost and, therefore, the appellants could not be apprehended and, therefore, he had returned to the spot. This story could have been narrated by the witness on the spot when the panchnama was being drawn.

(h) On this aspect of the case, it would be material to note that even according to the evidence of Police Sub-Inspector Shri N K Lila, Exh.41, he came to know about the arrival of Bogha on the spot when panchnama was being drawn and, therefore, according to the evidence of Mr Lila, he took Bogha as well as the informant with him to the police station and, thereafter he recorded further statement of the informant and the statement of Bogha.

(i) The above aspect is totally contradicted by the evidence of Bogha Arjan as he says that he did not contact the police but went to the hospital and took custody of the dead body of the deceased and thereafter his statement was recorded by the police. As per the evidence coming from the post mortem note, it is clear that the post mortem was completed by the concerned Medical Officer at 2.15 p.m. and, therefore, custody of the dead body of the deceased could not have been handed

over to Bogha before 2.15 p.m.and, therefore, statement of Bogha could not have been recorded before 2.15 p.m.

(j) Witness Bogha has clearly stated that he had told Nonghan Savdas on the spot when panchnama was going on, that the four appellants had committed the murder of the deceased and yet Nonghan Savdas did not convey this fact to the police though the police officers were present on the spot and in fact they were busy with the investigation of the present case itself. Bogha has stated that his statement was recorded between 12 noon and 12.30 p.m. which does not appear to be proper, in view of the above position which indicated that his statement could not have been recorded before 2.15 p.m.

(k) The place of offence is surrounded by many shops and it is a thickly populated locality. Even there is a rickshaw stand and there is taxi stand and even vehicles were found stationary at the time of the incident. This fact is supported by evidence of Bogha Arjan that the appellants hired a tempo and ran away by the said tempo and he also hired another tempo and chased the appellants, yet no attempt has been made to find out some eye witnesses from the surroundings, one occupant of a pan shop has been examined by the police, but the Investigating Police Agency did not arrange for a test identification parade with a view to get the appellants identified at such a period. Therefore, though there is possibility of availability of disinterested and neutral witness, the prosecution agency has not made an effort to utilize the said opportunity.

(l) Even according to the evidence of Bogha that just by the side of the above pan shop there are two other pan shops. At least the occupants of those two pan shops would have been material witnesses in this case. These witnesses have not been examined.

(m) Bogha Arjan straightaway went to Sudama Chowk to enquire about his father. Even places of his relatives were not seen and no enquiry was made by those places visited by Bogha.

(n) No investigation was undertaken to find out the owner or driver of the tempo hired by the

appellants and the tempo hired by the witness Bogha Arjan. Some clues could have been obtained by the Investigating Police Officer by recording the statement of witnesses who might have got their vehicles at the place where the above two vehicles were also lying stationary. No attempt has been made by the Investigating Officer to get track of those two vehicles.

(o) Though the witness has said that he had conveyed to Nonghan Savdas that the four appellants had killed the deceased and that the said information was conveyed him on the spot, when panchnama was going on, during the cross examination of the witness, it has been found out that this fact has not been stated by the witness before the police when the statement was recorded and there was contradictory versions during the course of recording of evidence of the police Investigating Officer.

(p) It seems that according to the case of the witness himself, appellant No.1 had left village Mitrala before 5 to 6 years. It appears from the record that the appellants have not been staying at village Mitrala. It can be gathered that appellant Karsan Laxman has now been staying at Junagadh and appellant Kala Arjan has been staying at Porbandar. Appellant Lila Mashari has been staying at Kutiyan and appellant Hardas Mashari has also been staying at Kutiyan. There is no evidence contrary to the said factual aspect. This would mean that the appellants have been staying at different places since last few years before the date of the incident and yet they are shown to have gathered together at Porbandar. There is nothing on record to show that these appellants had some information that deceased was likely to go to Porbandar on the date of the incident. It is not clear as to how the four appellants gathered together at Porbandar though they have been staying at different places since last few years before the incident.

(q) So far as Balu Rama, Exh.34 is concerned, he is the informant and according to his evidence, after lodging FIR, he had come to the spot in police jeep with police officers and at that time Nonghan Savdas and eye witness Bogha were present on the spot.

(r) It is really surprising that this witness Balu Rama did not have any contact either with Nonghan Savdas or with Bogha. Even neither Nonghan nor Bogha had any contact with Balu Rama.

(s) Since Nonghan and Bogha both were present at this village, it would necessarily mean that Nonghan must have told Bogha that FIR was filed. Even Balu Rama, after meeting Nonghan and Bogha at the place, did not inform the police officer who was drawing panchnama on the spot. It is also a matter of evidence of Balu Rama Exh.34 that even when he arrived at the spot in police jeep, dead body of the deceased was still lying there and he had also seen Nonghan and Bogha at the spot. The evidence of Bogha is quite contrary to it since he has clearly deposed that dead body of the deceased was not there when he returned to the spot after giving up the chase.

(t) Even Nonghan Savdas, Exh.39 has also stated in his evidence that appellants' names were conveyed to him by Bogha Arjan on the spot. Statement of this witness Nonghan Savdas, according to his evidence, was recorded 16 to 17 days after the incident. According to his evidence, he had gone to the bus stand to go to Mitrala and that some people of Mitrala had told him that Arjan had run away and therefore, his sons had gone to Porbandar for enquiring about Arjan. Names of these people of Mitrala have not been disclosed by the witness and the explanation is that he did not know them. It is not explained as to how he came to know these were the persons of village Mitrala. Therefore, there is little doubt about the testimony of this witness.

(u) Vasubhai Exh.40 had witnessed the initial incident and has stated that he had seen four persons beating the deceased just in front of his pan shop. However, no test identification parade has been carried for the identification of the assailants. It seems that no enquiry has been made from him as to whether the assailants possessed any weapon while causing injuries to the deceased. It has also not been attempted to ascertain from this witness as to at what time he left the place after closing the shop. It is also not ascertained as to whether the deceased was alive or killed when he left the shop.

Therefore, the efforts made to ascertain the facts from this witness appear to be half-hearted.

(v) PSI, N K Lila at Exh.41 has stated in para 3 of his cross examination that at the time when he started panchnama of the scene of offence, he learnt that Bogha Arjan was present there. Even despite that position, no effort was made by him to immediately record his statement. Inquest panchnama was over by 11 am and panchnama of the scene of offence was recorded thereafter. His evidence that the statement of Bogha Arjan was recorded very soon stands falsified by the evidence of Bogha that his statement was recorded after he took custody of the dead body of the deceased which could not have been taken by him before 2.15 p.m. because post mortem was concluded by 2.15 p.m. as per the post mortem report referred to hereinabove. There is no other evidence on record to convict the appellants. Panch witness has also turned hostile. The materials recorded in the panchnama have not been proved through evidence of panch witness.

32. From the above, it is clear that there is solitary evidence of Bogha Arjan involving the appellants in the case as said above. In view of the above discussion, it is very risky to rely upon the sole testimony of this witness in view of his substantial interest in favour of the deceased on the one hand and against the appellants on the other hand. Looking to the above reasons, we are not prepared to rely upon the sole testimony of this witness. It is more so, when it is difficult to hold that he was really an eye witness to the incident and he has witnessed the incident in question. Once it is found that the evidence of this witness Bogha is not reliable and trustworthy, there is no other evidence to connect the appellants with the crime in question and consequently when the evidence of Bogha Arjan is found to be not reliable, then in that event, the appellants will naturally be entitled to a benefit of reasonable doubt.

33. For the foregoing reasons, we are of the considered opinion that the prosecution has not proved its case against the appellants beyond any reasonable doubt and since the evidence of the sole eye witness Bogha Arjan is found to be not reliable and not trustworthy, it is not safe to depend upon the said

evidence for convicting the appellants for a very serious offence of murder which is punishable with death or imprisonment for life. Suffice it to say that the appellants are entitled to benefit of reasonable doubt. As said above, we have been taken through the oral and documentary evidence and the reasonings and findings of the learned Judge recorded in his judgment by the learned Advocates for the parties and after giving our anxious thoughts to those documentary and oral evidence as well as to the reasonings and findings of the learned Judge, we are of a considered opinion that the prosecution has not proved its case beyond any reasonable doubt and, therefore, the appellants are entitled to benefit of doubt. In that view of the matter, these two appeals are required to be allowed and the appellants are required to be acquitted of the charge levelled against them.

34. In above view of the matter, these two appeals are allowed. The impugned judgment and conviction order recorded by the learned Addl.Sessions Judge, Porbandar dated 20.7.1992 in Sessions case no.3/92 are hereby set aside. The appellants are hereby ordered to be acquitted of all the charges levelled against them. They shall be set at liberty forthwith, if no longer required in any other case. Fine, if paid, shall be refunded to them. We do not disturb the order as to disposal of muddamal articles recorded by the learned Judge.

Date: 27.12.2001 [B J Shethna, J.] [D P Buch, J.]
msp